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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1959.

No. 738

KIEKHAEFER CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Kiekhaefer Corporation, respectfully petitions this Honorable Court for a Writ of Certiorari to review an Opinion and Decree of the United States Court of Appeals for the Seventh Circuit.

Petitioner respectfully shows:

OPINION.

The Opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported. Such opinion is appended hereto as Appendix A.

JURISDICTION.

a. The Decree of the United States Court of Appeals for the Seventh Circuit is dated January 28, 1960, and was filed and entered on that same date.

b. The Order of the United States Court of Appeals for the Seventh Circuit denying Petitioner's Petition for Rehearing was denied by said Court on January 26, 1960.

c. The statutory provision believed to confer on this Court jurisdiction to review the Decree by Writ of Certiorari is Section 1254 of Title 28 of the United States Code.

QUESTION PRESENTED FOR REVIEW.

The question herein presented is whether under the circumstances here present Petitioner has a right to judicial review by the United States Court of Appeals for the Seventh Circuit of the objections which it urged before both the Trial Examiner in an unfair labor practice proceeding and the National Labor Relations Board in its Statement of Exceptions which was rejected by said Board on the ground that it had not been timely filed.

STATUTES AND RULES.

The pertinent statutes and rules are as follows:

Section 1254 of Title 28 of the United States Code.
Section 160(e) of Title 29 of the United States Code.
Section 160(f) of Title 29 of the United States Code.
Section 1010 of Title 5 of the United States Code.
Section 101.12, Statements of Procedure, Series 7, of the National Labor Relations Board, 29 C. F. R. § 101.12.
Section 102.6, Rules and Regulations, Series 7, of the National Labor Relations Board, 29 C. F. R. § 102.6.
Section 102.48, Rules and Regulations, Series 7, of the National Labor Relations Board, 29 C. F. R. § 102.48.

The text of these statutes and rules is set forth in Appendix B.

STATEMENT OF THE CASE.

Respondent, National Labor Relations Board (hereinafter sometimes called the "Board"), issued a complaint against Petitioner, Kiekhaefer Corporation, alleging that Petitioner had engaged in unfair labor practices in violation of the National Labor Relations Act. (R. 251.) A hearing on the matter was held before a Trial Examiner. Prior to the hearing, on September 16, 1958, a Subpena Duces Tecum was issued by a member of the Board to Sheldon M. Charone, Attorney for the Thirteenth Region of the Board, ordering him to appear before the Trial Examiner and to bring with him and produce certain documents and other papers. (R. 285.) Under date of September 19, 1958, Sheldon M. Charone filed with the Board a Motion to Revoke Subpena Duces Tecum. (R. 268.) The Board referred the Motion to the Trial Examiner for ruling. Petitioner presented a Memorandum in Opposition to Motion to Revoke Subpena Duces Tecum to the Trial Examiner at the opening of the hearing, on September 24, 1958. (R. 14, 277.) The Trial Examiner granted the Motion to Revoke Subpena Duces Tecum and upon his doing so, the Petitioner objected on the record. (R. 17.) After the close of the hearing before the Trial Examiner, a brief to the Trial Examiner was filed by Petitioner.[1] In its brief Petitioner argued that the evidence did not support the allegation that it had engaged in unfair labor practices and also referred to its exception to the Trial Examiner's granting of the Motion to Revoke Subpena Duces Tecum.

The Intermediate Report and Recommended Order of

1. Petitioner's Brief was not printed as part of the record below but was submitted to the lower court by Petitioner and a copy of such Brief, certified by the lower court, is submitted herewith.

the Trial Examiner was issued December 29, 1958. (R. 287.) The Trial Examiner found that Petitioner had engaged in unfair labor practices and recommended that the Board issue an order requiring Petitioner to cease and desist from further unfair labor practices and to take certain affirmative action. The Intermediate Report and Recommended Order and the Order Transferring Case to the National Labor Relations Board were received in the offices of Foley, Sammond & Lardner (then Fairchild, Foley & Sammond), Milwaukee, Wisconsin, the law firm of which James I. Poole, attorney of record for Petitioner, is a partner, on the afternoon of December 31, 1958. Such law firm was operating with a reduced staff because of the New Year's Day holiday and Mr. Poole did not receive the documents until January 2, 1959. Counsel for Petitioner prepared Statement of Exceptions on Behalf of Kiekhaefer Corporation, dated January 19, 1959, and Brief on Behalf of Kiekhaefer Corporation, dated January 21, 1959, and mailed them to the Board on January 21, 1959, by Air Mail, Certified Mail, Return Receipt Requested, acting under the belief that mailing in this manner constituted filing. (R. 326.) It is believed the Statement of Exceptions and Brief arrived in Washington, D. C. on January 21, 1959. The Statement of Exceptions and Brief were received by the Board Central Office in Washington, D. C. at about noon January 22, 1959.

On January 23, 1959, the Board returned the Statement of Exceptions and Brief to Petitioner stating that they could not be accepted because they had not been timely filed. The Board stated that under its Rules and Regulations the documents had to be received by the Board in Washington on January 21, 1959, in order to be timely filed and they had not been received until January 22, 1959. (R. 314.) On January 29, 1959, Petitioner mailed to the Board, by Air Mail, Certified Mail, Return Receipt Re-

quested, a Motion for Acceptance of Respondent's Statement of Exceptions to Trial Examiner's Intermediate Report. (R. 315.) Along with the Motion, Petitioner mailed to the Board the Statement of Exceptions and Brief originally filed with the Board and returned by them. These documents were received by the Board on February 2, 1959. Under date of February 9, 1959, the Board issued its Order and included as a Footnote to the Order a statement that Petitioner's Motion for Acceptance of Respondent's Statement of Exceptions to Trial Examiner's Intermediate Report, was denied. (R. 326.) The Order of the Board stated that no timely exceptions to the Trial Examiner's Intermediate Report and Recommended Order had been filed with the Board and adopted the findings, conclusions and recommendations of the Trial Examiner. (R. 326.)

On March 11, 1959, Petitioner filed with the United States Court of Appeals for the Seventh Circuit a Petition to Review and Set Aside an Order of the National Labor Relations Board. The basis for the jurisdiction in said Court was Section 160(f) of Title 29 of the United States Code. Said Court denied the Petition, limiting its consideration of the case to the question of whether the Board properly rejected Petitioner's exceptions to the Trial Examiner's Recommended Order as untimely. In its opinion the Court stated that no extrordinary circumstances had been alleged by Petitioner. It also stated, in distinguishing *National Labor Relations Board* v. *International Woodworkers* (9 Cir., 1956), 238 F. 2d 378, a case upon which Petitioner had relied, that in that case the exceptions were actually in Washington on the due date before the official close of business, but were not delivered to the office of the Board only because that office had closed early on account of a severe snowstorm.

Petitioner moved for rehearing but said Petition was denied.

ARGUMENT.

a. The decision of the court below in the instant case is in conflict with the decision of the Court of Appeals for the Ninth Circuit in the case of N. L. R. B. v. Red Spot Electric Co. (9 Cir., 1951), 191 F. 2d 697.

The case of *N. L. R. B.* v. *Red Spot Electric Co.* is in conflict with the instant case on the question of whether the Trial Examiner is an agent of the Board. In the *Red Spot* case the respondent had not filed exceptions to the intermediate report of the Trial Examiner and the recommended order of the Trial Examiner had been adopted by the Board automatically. The Board moved for summary entry of a decree for the enforcement of its order in the Court of Appeals. The respondent did not appear and the Board took the position that the court was compelled to order enforcement summarily.

The statute in question was the same one involved in the instant case, Section 10(e) of the National Labor Relations Act (Section 160(e) of Title 29, U. S. C.). That section provides in part as follows:

> "• • • No objection that has not been urged before the Board, its member, *agent*, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." (Emphasis supplied.)

The Court held that it had authority to examine the record, and as one of the bases for its authority, stated that the "objections were made by *Red Spot* before the Trial Examiner, *an agent of the Board.*" (Emphasis supplied.) F. N. 3, p. 699.

The Court also discussed the validity of Section 101.12

of the Board's Statements of Procedure and Section 102.48 of the Board's Rules (29 C. F. R. § 101.12 and 29 C. F. R. § 102.48). These sections attempt to require as an absolute prerequisite to Court review, the filing of exceptions to the Intermediate report. Section 101.12 provides in part as follows:

> "(b) If no exceptions are filed to the Intermediate Report, and the respondent does not comply with its recommendations, the Board adopts the Report and Recommendations of the Trial Examiner. *All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes.*" [Emphasis supplied.]

Section 102.48 provides in part as follows:

> "(a) In the event no Statement of Exceptions is filed as provided in this part, the findings, conclusions, and recommendations of the Trial Examiner as contained in his Intermediate Report and recommended order shall be adopted by the Board and become its findings, conclusions, and order, *and all objections and exceptions thereto shall be deemed waived for all purposes.* However, the Board may, in its discretion, order such case closed upon compliance." [Emphasis supplied.]

The Court stated:

> "29 C. F. R. §§ 101.12, 102.48, seeks to provide that 'objections' of a party not transmuted into 'exceptions' for administrative review are waived. But such a self-serving proviso cannot limit judicial discretion in determining whether a mandatory order shall be issued and is therefore unenforceable. * * *" F. N. 3, p. 698.

The Court in effect held that insofar as the rules of the Board require the filing of a statement of exceptions as an absolute prerequisite to obtaining court review, they are unenforceable, and an objection urged before the Trial Examiner, who is an agent of the Board, will be considered by the Court.

The question of whether the Trial Examiner is an agent of the Board was also raised in the instant case. Petitioner, in its reply brief filed with the Court of Appeals for the Seventh Circuit, took the position that the Trial Examiner was an agent of the Board and that since the exceptions being urged before said Court had been urged before the Trial Examiner, Petitioner was entitled to be heard upon such exceptions under the express terms of Section 10(e) of the National Labor Relations Act. The Court did not expressly mention this contention but apparently disposed of it indirectly in the following excerpt from its opinion:

> "Section 10(c) of the Act provides for the Recommended Order to become the Board's Order where no exceptions are filed to the trial examiner's Intermediate Report and Recommended Order within twenty days of service on the parties. *Nor on judicial review under Section 10(e), may this Court consider any objection which has not been urged before the Board, lacking excuse of such failure to object because of extraordinary circumstances. Kovach* v. *N. L. R. B.* (7 Cir., 1956), 229 F. 2d 138, 143. * * *" [Emphasis supplied.]

The Court's decision in the instant case and its reference to the *Kovach* case, which held that the Trial Examiner was not an agent of the Board, make it obvious that the Court of Appeals for the Seventh Circuit does not consider the Trial Examiner to be an agent of the Board for purposes of Section 10(e) of the National Labor Relations Act. This is directly in conflict with the holding of the Ninth Circuit in *N. L. R. B.* v. *Red Spot Electric Co.* (9 Cir., 1951), 191 F. 2d 697. Therefore this Court should grant certiorari and resolve this conflict.

b. The decision of the Court below in the instant case is in conflict with the decision of the Court of Appeals for the Ninth Circuit in the case of N. L. R. B. v. International Woodworkers (9 Cir., 1956), 238 F. 2d 378. Further, the opinion of the lower court in the instant case distinguishes that case on a ground that is not a part of the record or decision in that case and on the basis of a statement that is not factually correct, thereby departing so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision.

The case of *N. L. R. B.* v. *International Woodworkers* is in conflict with the instant case on the question of what constitutes "extraordinary circumstances" as that phrase is used in Section 10(e) of the National Labor Relations Act (Section 160(e) of Title 29, U. S. C.). In the *Woodworkers* case the last day for filing exceptions to the Trial Examiner's Intermediate Report was January 20th. The exceptions were mailed to the Board by respondent union at 9:00 a.m. on that day, Special Delivery Registered, from Redding, California. The exceptions were not received by the Board until January 23rd. The respondent union alleged on information and belief that the exceptions were in Washington on January 20th, but "were not delivered to the office of the Board on that day because the office of the Board had closed at 4:00 p.m. on January 20, 1956, and did not reopen until 9:00 a.m. on January 23, 1956." p. 379. The Board rejected the exceptions as not being timely filed and a week later adopted the Recommended Order of the Trial Examiner.

The matter before the Court was the petition of the Board for a summary decree enforcing its order. The court, after setting forth the facts, rendered its opinion as follows:

"Heretofore we have held that the Court would not

enforce an order of the Board summarily simply because the respondent did not appear here, but would examine the record in order to discover whether the order was a proper one for this Court to enforce. We are entitled to consider whether or not this case falls under Section 10(e) of the National Labor Relations Act, 29 U. S. C. A. § 160(e), which provides in part:

> 'No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court unless the failure or neglect to urge such objection should be excused because of extraordinary circumstances.'

If the objection was not properly made before the Board or its agency, the circumstances recited by respondent are so extraordinary that the Board should have considered the objections.

"In any event, this Court is of opinion that the order should not be enforced by us until the Board has passed upon the record itself. Under these circumstances, the order of enforcement is denied. The cause is remanded to the Board with directions to consider the matter on the merits, including the objections of respondent which are in its office.

"While this Court does not disclaim its right to review the matter on the merits, *National Labor Relations Board* v. *Cleff*, 9 Cir., 214 F. 2d 1, it is considered better practice to require the Board to pass upon the questions first." pp. 379-380.

The question of whether "extraordinary circumstances" are present was before the court in the instant case and the facts of the two cases are almost identical. In both cases, the exceptions were mailed on the last day for filing. In the *Woodworkers* case they were mailed Special Delivery Registered, from Redding, California, the city in which the attorney for respondent's office was located. In the instant case they were mailed Air Mail, Certified Mail, from Milwaukee, Wisconsin. In both cases it is believed that the exceptions arrived in Washington on the last day

for filing but were not delivered to the Board on that day because its office was closed. In the *Woodworkers* case the exceptions were received by the Board three days after the last day for filing, in the instant case they were received the next day.

In both cases the Board rejected the exceptions as being untimely filed. In the *Woodworkers* case the Board issued its order a week after the exceptions were received. In the instant case the order was issued eighteen days after the exceptions were received. In the *Woodworkers* case the union, a week after the Board issued its order, petitioned the Board to reopen its decision. In the instant case Petitioner, *prior* to the issuance of the Board's order, filed a motion for acceptance of the exceptions. In both cases the motion was denied.

It is apparent that insofar as the two fact situations differ, the facts in the instant case are more favorable for Petitioner than the facts in the *Woodworkers* case were for the union. Petitioner's exceptions were received by the Board one day after the last day for filing, as compared to three; Petitioner filed a motion for acceptance of its exceptions prior to the issuance of the Board's order, as compared to afterward; and Petitioner's exceptions were in the Board's office eighteen days before the Board issued its order, as compared to seven.

In spite of this striking similarity between the *Woodworkers* case and the instant case, the lower court here came to a contrary decision, distinguishing the *Woodworkers* case as follows:

> "Petitioner also relies on *N. L. R. B.* v. *International Workworkers* (9 Cir., 1956), 238 F. 2d 378. There the Court found (page 379) '• • • the circumstances recited by respondent are so extraordinary that the Board should have considered the exceptions.' *The exceptions were actually in Washington on the due*

date before the official close of business, but were not delivered to the office of the Board only because that office had closed early on account of a severe snowstorm." [Emphasis supplied.]

Petitioner contends that the ground on which the case is distinguished is not a proper one. There is no mention whatever anywhere in the record of the *Woodworkers* case of a snowstorm. It is not mentioned in the pleadings of the parties or in any of the other documents filed. More important, there is no mention of the snowstorm in the decision of the Court.

Petitioner alleges that it is judicial error, and a far departure from the accepted and usual course of judicial proceedings, for a court to distinguish a decision of another court on a ground not found anywhere in the record of the case or in the decision of such court. It appears to be grossly unfair to Petitioner to take a case upon which it strongly relies and explain it away on a ground which is not even mentioned in the court's decision. The court in the *Woodworkers* case set forth the facts of the case in some detail, and, based on such facts, reached the conclusion that the matter was to be remanded to the Board. Such facts did not include mention of a snowstorm and to now state that its decision was as it was because of a snowstorm is neither logical, reasonable, nor in accordance with accepted and usual judicial proceedings.

Further, the above italicized portion of the opinion of the lower court in the instant case includes the statement that in the *Woodworkers* case the exceptions were actually in Washington on the due date "before the official close of business." This statement is not supported by the facts of the case and is clearly incorrect. The exceptions were mailed on the last day for filing at 9:00 a.m. from Redding, California. At that time it was noon in Washington, D. C. and it is inconceivable that in January, 1956,

before the day of the jet airliner, the exceptions could possibly have arrived in Washington, D. C., over 2,000 miles away, before the official close of business at 5:00 p. m.

The respondent in the *Woodworkers* case did not allege the exceptions were in Washington before the official close of business. The opinion of the court also did not so state. The facts clearly are that the exceptions could not have been in Washington, D. C. before the official close of business and the statement in the opinion in the instant case to that effect is incorrect. To distinguish the *Woodworkers* case on the basis of a statement that is incorrect is, as was the reference to the snowstorm, a departure from the usual and accepted course of judicial proceedings which calls for the exercise of this court's power of supervision.

Disregarding the erroneous ground and incorrect statement which the lower court uses to distinguish the *Woodworkers* case, it is apparent that the fact situation in the two cases are for practical purposes identical. The decisions, therefore, of the Court of Appeals for the Ninth Circuit in the *Woodworkers* case and the Court of Appeals for the Seventh Circuit in the instant case, are in conflict. This conflict should be resolved by the granting by this Court of Petitioner's Petition for Writ of Certiorari.

c. The lower court has departed from the accepted and usual course of judicial proceedings in another respect.

The lower court in the instant case has departed from the accepted and usual course of judicial proceedings in that it has failed to consider a critical question which Petitioner raised. In its opinion, the court below makes the following statement: "No extraordinary circumstances have been alleged." Petitioner contends that such statement is wholly incorrect and that it did allege extraordi-

nary circumstances. The question of whether extraordinary circumstances were present is important because if they were, then under the express language of Section 10(e) of the National Labor Relations Act (Section 160(e) of Title 29, U. S. C.), Petitioner has a right to be heard on the merits of its objections.

Petitioner contends that it clearly alleged extraordinary circumstances. In its Reply Brief an entire section, headed "C. There Are Extraordinary Circumstances Present," was devoted to this argument. In such section Petitioner pointed out at least six specific items which it alleged constituted extraordinary circumstances. Each of these items, with one possible exception, are included in Petitioner's original pleading filed with the lower court, viz., its Petition to Review and Set Aside an Order of the National Labor Relations Board. Therefore the "extraordinary circumstances" were alleged in its pleading and argued in its Reply Brief.

Clearly Petitioner alleged extraordinary circumsfances. Since the court was of the mistaken opinion that it did not, the court obviously could not have considered those actually alleged. This failure so to do is prejudicial to Petitioner and is such a departure from the accepted and usual course of judicial proceedings that this Court should exercise its power of supervision and grant this Petition for Writ of Certiorari.

d. The question presented in this case is an important question of Federal law which has not been, but should be, settled by this Court.

The question presented in the instant case, of whether the Trial Examiner is an "agent" of the Board within the meaning of that word as it is used in Section 10(e) of the National Labor Relations Act[1] (Section 160(e) of Title 29, U. S. C.), is of great importance in the administration of the National Labor Relations Act. This question has not been, but should be, settled by this Court.

If the Trial Examiner is an "agent" of the Board, then objections raised before him, although not raised before the Board in a statement of exceptions, can be urged before the Courts of Appeals. This could and would have a great effect on the procedure and tactics used in unfair labor practice cases, both by the respondents charged with unfair labor practices and by the Board. Further, some sections of the Board's Statements of Procedure and Rules and Regulations,[2] would be invalid. These are the sections

1. Section 10(e) provides in part "* * * No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *"

2. Section 101.12(b) of the Statements of Procedure provides in part "(b) If no exceptions are filed to the Intermediate Report, and the respondent does not comply with its recommendations, the Board adopts the Report and Recommendations of the Trial Examiner. All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes."

Section 102.48 of the Rules and Regulations provides in part "(a) In the event no Statement of Exceptions is filed as provided in this part, the findings, conclusions, and recommendations of the Trial Examiner as contained in his Intermediate Report and recommended order shall be adopted by the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes. However, the Board may, in its discretion, order such case closed upon compliance."

which in effect provide that if no statements of exceptions are filed, the objections, although urged before the Trial Examiner, are waived forever.

This Court has never passed on the precise question of whether the Trial Examiner is an agent of the Board for purposes of Section 10(e) of the National Labor Relations Act and it apparently has been before the Courts of Appeals in only three cases, *N. L. R. B.* v. *Red Spot Electric Co.* (9 Cir., 1951), 191 F. 2d 697; *Kovach* v. *N. L. R. B.* (7 Cir., 1956), 229 F. 2d 138, and the instant case. *Red Spot* holds the Trial Examiner is an "agent" and *Kovach* and the instant case hold he is not. The question is of great importance in the field of labor law and this court should grant certiorari and answer it.

e. The decision in the court below is believed to be erroneous.

Petitioner submits that the decision of the Court below is erroneous and the decisions of the Court of Appeals for the Ninth Circuit in *N. L. R. B.* v. *Red Spot, supra,* and *N. L. R. B.* v. *International Woodworkers* (9 Cir., 1956), 238 F. 2d 378, are correct. The question of whether extraordinary circumstances are present and the *Woodworkers* case have been discussed fully above and will not be discussed again here. However, the question of whether the Trial Examiner is an "agent" of the Board within the meaning of Section 10(e) of the National Labor Relations Act bears further elaboration.

In addition to the *Red Spot* case, which is discussed in a. above, there are other bases for finding the Trial Examiner is an "agent" of the Board. First, the inclusion of the words "agent" and "agency" in Section 10(e)

of the National Labor Relations Act,[1] following the word "Board" would be completely superfluous and meaningless if the only objections which the courts could review were those urged before the Board. It is obvious Congress intended objections urged before someone other than the Board to be reviewable by the courts, otherwise it would have said Board only and not included agent or agency. Assuming, as it appears we must, that agent and agency were intended to have some significance, it is clear that the Trial Examiner is intended to be included as an agent.

The National Labor Relations Board's own Rules provide that the Trial Examiner is an agent of the Board. Section 102.6 of the Board's Rules and Regulations, 29 C. F. R. § 102.6, provides as follows:

> "The term 'Trial Examiner' as used in this part shall mean the *agent of the Board* conducting the hearing in an unfair labor practice or Telegraph Merger Act proceeding. The term 'Hearing Officer' as used in this part shall mean the agent of the Board conducting the hearing in a proceeding under Section 9 or in a dispute proceeding under Section 10(k) of the Act." (Emphasis supplied.)

Since the Board in its own rules defines the Trial Examiner as an agent of the Board, it would appear that he is also an agent of the Board within the meaning of that term in Section 10(e) of the Act.

Section 11 of the Administrative Procedure Act, Section 1010, Title 5, U. S. C., also indicates that the Trial Examiner is the agent of the Board. It provides in part that examiners shall be removable "by the agency in which they are employed." If the examiners are employed by

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1. Section 10(e) of the National Labor Relations Act provides in part "• • • No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. • • •"

the agencies, it would appear that they are agents of the agency.

The language of the statute itself, the Board's own rules, the Administrative Procedure Act, and the *Red Spot* case all clearly indicate that the Trial Examiner is an "agent" of the Board within the meaning of Section 10(e) of the National Labor Relations Act. As such, since Petitioner's objections were urged before him, Petitioner had a right to be heard on such objections by the lower court and the decision of such court denying review is erroneous.

The decision of the lower court is erroneous also because of the fact that the instant case is governed by the *International Woodworkers* case and extraordinary circumstances are present.

CONCLUSION.

For the reasons set forth above, individually and collectively, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term, 1959—January Session, 1960.

No. 12592

Kiekhaefer Corporation, *Petitioner*, *vs.* National Labor Relations Board, *Respondent*.

Petition for review of Order of the National Labor Relations Board.

January 5, 1960.

Before HASTINGS, *Chief Judge*, and KNOCH and CASTLE, *Circuit Judges*.

Knoch, Circuit Judge. The National Labor Relations Board issued a complaint alleging that petitioner had discriminatorily refused to recall an employee for reemployment because of his union activities, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act. After hearing, the trial examiner, on December 29, 1958, issued his Intermediate Report and Recommended Order, recommending issuance of an Order directing (*inter alia*) reinstatement of the employee with back pay.

Pursuant to its Rules, the Board entered an order December 29, 1958, transferring the case to the Board. This order expressly stated:

"'Exceptions to the Intermediate Report in this case

must be received by the Board in Washington, D. C., on or before Jan. 21, 1959." and "Attention is specifically directed to the excerpts from the Rules and Regulations appearing on the page attached hereto."

The Rules provide that (1) exceptions must be filed within twenty days, before close of business of the last day (or in such further period as the Board may allow) from the date of service of the order transferring the case, (2) that requests for extension of time must be received by the Board three days prior to the due date, and (3) that if no exceptions are filed, the Intermediate Report and Recommended Order will be adopted by the Board and become its Order, and all exceptions will be deemed waived. Petitioner's counsel received the order transferring the case (with the attached excerpts from the Rules) on December 31, 1958. January 21st passed without filing of exceptions.

On January 22, 1959, the Board received exceptions which has been mailed from Milwaukee, Wisconsin, January 21st. The same day the union, which had been the charging party in the proceedings before the Board, telegraphed the Board opposing acceptance of the late exceptions. January 23rd the Board wrote petitioner rejecting the exceptions as untimely. February 2nd petitioner filed a motion that the Board entertain the exceptions. Feb. 9th, the Board issued an order in which it recited that the aforesaid motion was denied as there was no reasonable doubt as to the date the exceptions had been due in Washington, D. C. and no adequate reason had been given for the delay.

Section 10(c) of the Act provides for the Recommended Order to become the Board's Order where no exceptions are filed to the trial examiner's Intermediate Report and Recommended Order within twenty days of service on the parties. Nor on judicial review under Section 10(e), may this Court consider any objection which has not been urged

before the Board, lacking excuse of such failure to object because of extraordinary circumstances. *Kovach* v. *N. L. R. B.* (7 Cir., 1956), 229 F. 2d 138, 143. No extraordinary circumstances have been alleged.

The first question before us here is: Did the Board properly reject petitioner's exceptions to the trial examiner's Recommended Order as untimely? We hold that the Board did not err in refusing to consider the exceptions. Thus we do not reach the issues raised in those exceptions.

Petitioner argues that the exceptions were filed in apt time, having been mailed on the date due, or, in the alternative, that there was substantial compliance with the Act and the Rules.

Section 10(c) provides that "* * * if no exceptions are *filed* within twenty days * * *". (Emphasis added.) Petitioner argues that the Board's Rules speak of filing and serving together. Section 102.46(a) refers to *filing* exceptions with the Board in Washington D. C., and to *serving*, on other parties, copies of exceptions filed. Petitioner then invites our attention to Section 102.89 which permits service to be made by registered mail, etc., and to Section 102.90(a) which states that the date of service is the day when the matter served is deposited in the United States Mail or delivered in person. Thus petitioner sees an ambiguity resulting from use of both "service" and "filing" in these and other sections of the Rules.

We see no such ambiguity in these Rules. In any event, there can be no mistaking the clear statement included in the notification of transfer of the case to the Board:

> "Exceptions to the Intermediate Report in this case must be received by the Board in Washington, D. C., on or before Jan. 21, 1959."

The excerpts inclosed, as aforesaid, included Section 102.91(b) which reads in part:

> "When the act or any of these rules require the filing of * * * exception, or other paper in any proceeding, such document must be received * * * before the close of business of the last day of the time limit, * * *."

Nor can we agree with petitioner that the requirement of filing in Washington, D. C., is an arbitrary or capricious rule which improperly discriminates against counsel located geographically distant from Washington.

Filing exceptions is tantamount to filing a notice of appeal and must be fully accomplished within the period allowed by statute or rule. *Howard* v. *Local 71, Wood, Wire & Metal, etc.* (7 Cir., 1953), 208 F. 2d 930, 932; *Hilker & Bletsch* v. *United States* (7 Cir., 1954), 210 F. 2d 847, 849-850.

In support of the theory of substantial compliance, petitioner cites *Jackson Chair Co., Inc.*, 110 N. L. R. B. 651, 652 (1954) and *Gulf Coast Oil Co.*, 97 N. L. R. B. 1513, 1514 (1952). In *Jackson*, the exceptions were timely filed but failed to designate page and line number of the record to which reference was made (as required by Section 102.46 of the Rules). Amended exceptions curing the error were accepted on the ground that the exceptions as originally filed constituted substantial compliance and the error was promptly corrected. In *Gulf Coast*, a telegram requesting extension of time to file exceptions was timely received and the extension had been granted by telegram. Written copies of the request were not served. However, timely telephone notice had been given to opposing counsel who also received a copy of the Board's telegram granting the extension. This was held to constitute substantial compliance. Both cases are clearly distinguishable from the matter before this Court.

Petitioner also relies on *N. L. R. B.* v. *International Woodworkers* (9 Cir., 1956), 238 F. 2d 378. There the

Court found (page 379) "* * * the circumstances recited by respondent are so extraordinary that the Board should have considered the exceptions." The exceptions were actually in Washington on the due date before the official close of business, but were not delivered to the office of the Board only because that office had closed early on account of a severe snowstorm.

Petition to set aside the order of the Board, or alternatively, to remand the case to the Board (with instructions to consider the merits of the exceptions) is denied.

APPENDIX B.

Pertinent Excerpt from Section 1254 of Title 28 of the United States Code.

§ 1254. *Courts of appeals; certiorari; appeal; certified questions.*

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

Section 160(e) of Title 29 of the United States Code.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in

part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Section 160(f) of Title 29 of the United States Code.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States

court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Pertinent Excerpt from Section 1010 of Title 5 of the United States Code.

§ 1010. *Appointment of examiners; assignment, removal and compensation; jurisdiction of Civil Service Commission.*

Subject to the civil-service and other laws to the extent not inconsistent with this chapter, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 1006 and 1007 of this title, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency

in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. * * *

Pertinent Excerpt from Section 101.12, Statements of Procedure, Series 7, of the National Labor Relations Board, 29 C. F. R. § 101.12.

* * *

(b) If no exceptions are filed to the intermediate report, and the respondent does not comply with its recommendations, the Board adopts the report and recommendations of the trial examiner. All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes.

* * *

Section 102.6, Rules and Regulations, Series 7, of the National Labor Relations Board, 29 C. F. R. § 102.6.

§ 102.6 *Trial examiner; hearing officer.*

The term "trial examiner" as used in this part shall mean the agent of the Board conducting the hearing in an unfair labor practice or Telegraph Merger Act proceeding. The term "hearing officer" as used in this part shall mean the agent of the Board conducting the hearing in a proceeding under section 9 or in a dispute proceeding under section 10(k) of the act.

Pertinent Excerpt from Section 102.48, Rules and Regulations, Series 7, of the National Labor Relations Board, 29 C. F. R. § 102.48.

§ 102.48 *Action of Board upon expiration of time to file exceptions to intermediate report.*

(a) In the event no statement of exceptions is filed as provided in this part, the findings, conclusions, and recommendations of the trial examiner as contained in his intermediate report and recommended order shall be adopted by the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes. However, the Board may, in its discretion, order such case closed upon compliance.

• • •

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In the Supreme Court of the United States

OCTOBER TERM, 1959

KIRKHAVEN CORPORATION, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 19-23) is reported at 273 F. 2d 314. The order of the National Labor Relations Board (R. 326-330) is unreported.

JURISDICTION

The judgment of the court below was entered on January 5, 1960, and a petition for rehearing was denied on January 26, 1960 (Pet. 2). The petition for a writ of certiorari was filed on February 27, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Board properly rejected, as untimely, exceptions to a trial examiner's intermediate report which were delivered to the Board after expiration of the time for filing exceptions.

2. Whether, in view of the lack of timely exceptions, the court below properly enforced the Board's order without examining, or requiring the Board to examine, the merits of the case.

STATUTE INVOLVED

Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 160(c)), provides in pertinent part:

> * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Section 10 (e) and (f) of the Act is reprinted in the petition (Pet. 24-26). The pertinent rules and regulations of the Board are reprinted at R. 301-306.

STATEMENT

Following investigation of a charge filed by Lodge No. 1947, International Association of Machinists, AFL-CIO (the "Union"), the General Counsel of the Board issued a complaint alleging that petitioner had discriminatorily refused to recall for employment an employee because of his union activities, thereby violating Section 8 (a) (1) and (3) of the Act (R. 287-288). The Company denied the allegations. After the hearing, the Trial Examiner on December 29, 1958 issued his "Intermediate Report and Recommended Order," in which he found that petitioner had violated the Act as charged, and recommended issuance of the customary order directing the Company to cease and desist from its unlawful conduct, to reinstate the employee with back pay, and to post appropriate notices (R. 287-300).

In accordance with its rules, the Board on the same day the Intermediate Report was filed entered an order transferring the case to the Board (R. 303-306). The Order expressly stated: "Exceptions to the Intermediate Report in this case must be received by the Board in Washington, D. C., on or before Jan. 21, 1959" (R. 301). It further stated: "Attention is specifically directed to the excerpts from the [Board's] Rules and Regulations appearing on the page attached hereto." These excerpts included provisions requiring that exceptions to the Intermediate Report be filed "within 20 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board" (Sec.

102.46, R. 302); that "[r]equests for an extension must be received by the Board 3 days prior to the due date" (Sec. 102.46, R. 302); that "[i]n the event no statement of exceptions is filed as herein provided * * * [the] intermediate report and recommended order shall be adopted by the Board and become its * * * order, and all objections and exceptions thereto shall be deemed waived for all purposes" (Sec. 102.48, R. 303); and that exceptions "must be received by the Board * * * before the close of business of the last day of the time limit, if any, for such filing or extension of time that may have been granted" (Sec. 102.91-(b), R. 306).

The foregoing documents—the Intermediate Report and Recommended Order of the Trial Examiner, and the Order Transferring Case to the Board together with the attached excerpts from the rules—were received by petitioner's counsel on December 31, 1958 (Pet. 4).

Petitioner mailed its exceptions from Milwaukee on January 21 (the date specified by the Board for their filing in Washington), and they were received by the Board on January 22 (R. 313, 314; Pet. 4). On the latter day, the Union telegraphed the Board, opposing acceptance of the exceptions (R. 313). On January 23, the Board returned the exceptions to petitioner as untimely filed (R. 314).

On February 2, 1959, petitioner filed a motion with the Board to accept the late-filed exceptions, and the next day the Union filed an opposition to the motion (R. 315, 325; Pet. 5). On February 9, the Board

issued its Order, adopting the recommended order of the Trial Examiner "pursuant to Section 10(c) of the * * * Act, as amended, and Section 102.48 of the * * * Board Rules and Regulations" (R. 326-330). The Board denied petitioner's motion for acceptance of the exceptions, because "there is no reasonable doubt as to the date the [petitioner's] exceptions were due in Washington, D.C., and no adequate reason has been given for the delay" (J.A. 326, p. 1).

The court below sustained the Board's refusal to entertain the untimely exceptions, and entered an enforcement decree. Noting that petitioner had not shown any extraordinary circumstances to excuse its failure to file timely exceptions before the Board, the court declined to consider the exceptions, or to remand the case to the Board to require it to do so (Pet. 19-23).

ARGUMENT

This case involves only the narrow issue whether the Board justifiably rejected, as untimely, exceptions to a trial examiner's intermediate report that were not filed within the period specifically provided by the Board's order accompanying the intermediate report. We submit that the court of appeals correctly sustained the Board's refusal to consider the untimely exceptions, and that the court therefore properly enforced the Board's order without inquiry into the merits of the exceptions. Furthermore, the correctness of the ruling below presents no question of general importance, but turns upon the facts of this particular case.

1. The Board's rejection of the exceptions as un-

timely was in accord with the settled principle of both judicial and administrative practice that, where a time limit for taking an appeal or filing exceptions is prescribed by statute, appeals or exceptions filed out of time may be rejected. See *Territo* v. *United States*, 358 U.S. 279; *Howard* v. *Local 74*, 208 F. 930, 932 (C.A. 7); *Hilker & Bletsch* v. *United States*, 210 F. 2d 847, 849-850 (C.A. 7); *Lewis-Hall Iron Works* v. *Blair*, 23 F. 2d 972 (C.A. D.C.); *Casalduc* v. *Diaz*, 117 F. 2d 915 (C.A. 1); *Poynor* v. *Commissioner*, 81 F. 2d 521 (C.A. 5); *Dayton Power & Light Co.* v. *Federal Power Commission*, 251 F. 2d 875, 877 (C.A. D.C.). Compare *United States* v. *Robinson*, 361 U.S. 220.

Section 10(c) of the Act (*supra*, p. 2) provides that "if no exceptions are filed within twenty days [or 'such further period as the Board may authorize'] after service" of the examiner's proposed report and order, "such recommended order shall become the order of the Board * * *." The Board's order in the instant case expressly stated that exceptions thereto "must be received by the Board in Washington, D. C., on or before Jan. 21, 1959" (R. 301). Admittedly, the exceptions were not received by the Board until after that date and, as the Board held in refusing to accept the untimely filing, "no adequate reason has been given for the delay" (J.A. 326, n. 1). In these circumstances, the Board was warranted in rejecting the exceptions as untimely filed.

Contrary to petitioner's contention (Pet. 9-13), the decision below is not in conflict with *National Labor Relations Board* v. *International Woodworkers of America*, 238 F. 2d 378 (C.A. 9). There the court held

(p. 379) that the failure to make timely filing was the result of circumstances "so extraordinary that the Board should have considered the objections," namely, that the exceptions "were not delivered to the office of the Board on [the due] day because the office of the Board had closed at 4:00 p.m." as the result of a severe snowstorm.[1] In the instant case, however, petitioner's Motion for Acceptance presented no comparable "extraordinary" circumstances, but only the excuse that petitioner believed that mailing of the exceptions constituted their "filing" with the Board (J.A. 315-324). The Board's order, however, explicitly stated that any exceptions "must be *received* by the Board in Washington, D. C." by the stated date (emphasis added).

2. The courts of appeals, following decisions of this Court, have repeatedly held that they may not examine issues as to which no exceptions were filed with the Board, and that, in the absence of exceptions or extraordinary circumstances, the Board's order should be enforced.[2] Petitioner's contention (Pet. 6-8, 15-18) that

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[1] While the fact of such snowstorm was not referred to in the *International* opinion, the court below in the instant case took judicial notice of that fact in distinguishing *International*.

[2] Decisions of this Court: *National Labor Relations Board* v. *District 50*, 355 U.S. 453, 463-464; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255-256; *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388-389; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 496-501.

Decisions of the Courts of Appeals: *National Labor Relations Board* v. *Noroian*, 193 F. 2d 172 (C.A. 9); *National Labor Relations Board* v. *Auburn Curtain Co.*, 193 F. 2d 826 (C.A. 1); *National Labor Relations Board* v. *Perry*, 244 F. 2d 17 (C.A. 4);

raising an issue before the examiner entitles a party to judicial review of that issue even in the absence of exceptions properly filed with the Board [3] would nullify this settled principle. Since Section 10(c) precludes the Board from reviewing a case in which no timely exceptions have been filed, the rule limiting judicial review to matters presented to the Board ordinarily requires judicial enforcement of Board orders in cases where no timely exceptions have been filed with the agency. The exception for cases where the Board "has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce" (*National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388) obviously is not here applicable.

National Labor Relations Board v. *Pugh & Barr*, 194 F. 2d 217 (C.A. 4); *Kovach* v. *National Labor Relations Board*, 229 F. 2d 138, 143 (C.A. 7); *National Labor Relations Board* v. *Shedd-Brown Mfg. Co.*, 213 F. 2d 163, 166 (C.A. 7).

[3] The dictum to that effect in *National Labor Relations Board* v. *Red Spot Electric Co.*, 191 F. 2d 697 (C.A. 9), upon which petitioner relies (Pet. 6-8), was subsequently rejected by the Ninth Circuit in *National Labor Relations Board* v. *Noroian*, 193 F. 2d 172, 173. In *Noroian*, where "[n]o statement of exceptions to the intermediate report was filed by respondents within the time required by law," the court, in summarily enforcing the Board's order, stated: "This court as now constituted is of the opinion that it is required by * * * [Section 10(e) of] the Act * * * to enter the decree enforcing the [Board's] order * * *."

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 738

KIEKHAEFER CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER, KIEKHAEFER CORPORATION.

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REPLY BRIEF FOR PETITIONER, KIEKHAEFER CORPORATION.

STATUTES AND RULES.

Paragraph 1 of Rule 24 of the Revised Rules of the Supreme Court of the United States provides in part as follows:

> "1. Counsel for the respondent shall have thirty days (unless enlarged by the court or a justice thereof, or by the clerk under the provisions of paragraph 5 of Rule 34), after receipt of a petition, within which to file forty printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this court. * * *"

ARGUMENT.

I.

The Brief for the National Labor Relations Board in Opposition Was Not Timely Filed.

Paragraph 1 of Rule 24 of the Revised Rules of this Court provides that counsel for respondent shall have thirty days after receipt of a petition within which to file its opposing brief. In the instant case, J. Lee Rankin, Solicitor General, admitted service of Petitioner's Petition for Writ of Certiorari on February 29, 1960. Applying the thirty day time period set forth in paragraph 1 of Rule 24, the opposing brief was due March 30, 1960. The opposing brief was not filed with the Clerk of this Court until March 31, 1960, and, therefore, was not timely filed.

Petitioner calls this to the attention of this Court not in order to ask the Court to strike Respondent's brief, but rather because it is Petitioner's alleged filing of a statement of exceptions and brief one day late that has given rise to the instant case. Were Petitioner to move to strike Respondent's brief as untimely, it is a certainty that Respondent would argue that in the interests of equity and justice it should be heard (and Petitioner would agree). However, when Respondent received Petitioner's exceptions and brief one day late, it summarily refused to consider them. It is this type of arbitrary conduct by the National Labor Relations Board which brings into play the principles of equity, and as a court of equity (as well as a court of law), the lower court should have reviewed the merits of this case or remanded the case to the Board for consideration of the merits there.

II.

Petitioner Has a Right to Review of the Merits Under the Statute.

Conceding that the statement of exceptions and brief filed by Petitioner were filed one day late, Petitioner has a right to judicial review by the Court of Appeals of the merits of this case under Section 10(e) of the National Labor Relations Act (Section 160(e) of Title 29, U. S. C.). That section provides in part as follows:

> "* * * No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

Petitioner, in fact, has a right to judicial review on two separate grounds. The first is that the trial examiner is an agent of the board, and since the objections urged before the court were urged before him, the above quoted language gives Petitioner a right to court review of such objections. The second is that even if the objections had not properly been urged at any level, the failure to urge them is excused because of extraordinary circumstances.

In spite of what Respondent may state the issues to be, Petitioner alleges that these two separate grounds for court review (which grounds Petitioner urged before the court below) are controlling, and the lower court's refusal to consider one (extraordinary circumstances are present) and its summary disposition of the other (the trial examiner as an agent of the Board) constituted judicial error calling for an exercise of this court's supervision.

III.

N. L. R. B. v. International Woodworkers (9 Cir., 1956), 238 F. 2d 378, Is Not Distinguishable.

Respondent in its brief contends that the instant decision is not in conflict with *N. L. R. B.* v. *International Woodworkers* (9 Cir., 1956), 238 F. 2d 378. Following the example of the lower court, it distinguishes such case on the grounds that there the failure to file the exceptions on time was excused because the office of the Board closed at 4:00 P.M. as a result of a severe snowstorm. (Resp. Br. 7) Respondent admits the decision of the court which decided the *Woodworkers* case did not mention a snowstorm, but states that the lower court in the instant case took "judicial notice" of the snowstorm in making its decision.

Petitioner contends that the argument of Respondent is *absolutely without merit.* The opinion of the court in the *Woodworkers* case does not include one word about a snowstorm. The record in that case does not include one word about a snowstorm. Under these circumstances how can the lower court in the instant case possibly state that the decision was as it was because of such snowstorm? Such a statement is completely contrary to both reason and justice.

Respondent explains the lower court's reference to the snowstorm by stating that the court took judicial notice of it. (Resp. 7) It would have been one thing for the court in the *Woodworkers* case to state in its decision that it would take judicial notice of the storm and excuse the late filing on that ground. That would be a valid use of judicial notice. However, it is completely another thing for the court in the instant case to take judicial notice of a ground for a decision which is not found anywhere in

the opinion or record. The lower court here is taking judicial notice not of the storm, but of the basis for the *Woodworkers* decision. This is clearly not a situation where the doctrine of judicial notice can be applied.

The fact that the exceptions in the *Woodworkers* case were mailed from Redding, California at 9:00 A. M., Pacific time, makes it certain that they could not possibly have reached the Board's office in Washington by 5:00 P. M., Eastern time, on that same day. Therefore, snowstorm or no snowstorm, the failure of the exceptions to reach the Board's office on time was due to one thing—late mailing.

The lower court's distinguishing of the *Woodworkers* case is clearly not based on proper grounds and therefore the decision of the lower court in the instant case and the decision in that case are in conflict.

IV.

The Trial Examiner as an Agent of the Board.

Respondent contends that to allow judicial review of an issue raised before the trial examiner but not included in exceptions properly filed with the Board would nullify a settled principle of judicial review. (Resp. Br. 7-8) Petitioner submits that there is no "settled principle" in regard to the question of whether the trial examiner is an agent of the Board.

Only one of the cases cited by Respondent in support of this "settled principle" actually deals with the question of whether the trial examiner is an "agent" of the Board, *Kovach* v. *N. L. R. B.* (7th Cir., 1956), 229 F. 2d 138. None of the others deal with this issue. A principle can hardly be settled if only one case has been decided supporting it. Further, the case of *N. L. R. B.* v. *Red Spot Electric Co.* (9th Cir., 1951), 191 F. 2d 697, holds contrary to the *Kovach* case that the trial examiner *is* an agent of the Board.

Respondent states that the Ninth Circuit in *N. L. R. B.* v. *Noroian* (9th Cir., 1951), 193 F. 2d 172, rejected its holding that the trial examiner was an agent of the Board. (Resp. Br. 8) This is clearly not true. In the *Noroian* case the issue of whether the trial examiner was an agent of the Board was not raised and in fact there is no mention whatever of whether any objections were urged before the trial examiner, which of course would be a prerequisite to raising the issue.

As to the general principle of judicial review where no exceptions are filed with the Board, there is ample authority for a court of equity's reviewing the merits of the case and refusing to summarily enforce the Board's order. In a case decided December 31, 1959, the Court of Appeals for the First Circuit refused to summarily enforce the Board's order in a fact situation very similar to that in the instant case. *N. L. R. B.* v. *Central Mercedita, Inc.* (1st Cir., 1959), 273 F. 2d 370.

In that case respondent had mailed its exceptions on the due date and they were received by the Board two days late. The Board rejected them and petitioned for summary enforcement of its order. The court refused to summarily enforce the order stating in its opinion that "It seems to us that under the circumstances the Board acted rather arbitrarily in defaulting the respondent because its exceptions were only two days late. * * *" P. 372. The court also cited its power as a court of equity to review the facts and circumstances of the case and noted that in "* * * the case at bar it is evident that * * * [it] is not one in which the respondent made no attempt to file exceptions to the Intermediate Report and offers no excuse for its failure to do so. * * *" P. 372. This same statement could be made as to the instant case and Petitioner contends that the decision in the *Central Mercedita* case is in conflict with the one now before this court.

It is interesting to note that after the court's refusal to grant summary enforcement of its order, the Board in the *Central Mercedita* case accepted the exceptions of the respondent and is considering the matter on the merits.

For other cases holding that a court of appeals as a court of equity can review the merits of a case, even where no objections have been urged previously, see *N. L. R. B.* v. *International Woodworkers* (9th Cir., 1956), 238 F. 2d 378, 379, *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944), *Federal Power Commission* v. *Arizona Edison Co.* (9th Cir., 1952), 194 F. 2d 679, 685-686, *Fong Sik Leung* v. *Dulles* (9th Cir., 1955), 226 F. 2d 74, 79, and *Brown* v. *Alaska Industrial Board* (9th Cir., 1955), 224 F. 2d 680, 682.

V.

Reasons for Granting Petition.

Petitioner submits that there are several separate reasons why its petition should be granted. First, the decision below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in the case of *N. L. R. B.* v. *Red Spot Electric Co.* (9th Cir., 1951), 191 F. 2d 697, with the decision of the Court of Appeals for the First Circuit in the case of *N. L. R. B.* v. *Central Mercedita, Inc.* (1st Cir., 1959), 273 F. 2d 370, and with the decision of the Court of Appeals for the Ninth Circuit in the case of *N. L. R. B.* v. *International Woodworkers* (9th Cir., 1956), 238 F. 2d 378. Second, the court below departed from the accepted and usual course of judicial proceedings in distinguishing the *Woodworkers* case and in refusing to consider the question of whether extraordinary circumstances were present in the instant case. Third, the question of whether the trial examiner is an agent of the Board is an important question of Federal law which has not been, but

should be, settled by this court. Fourth, the decision below is erroneous on both the issue of whether the trial examiner is an agent of the Board and whether extraordinary circumstances were present.

CONCLUSION.

For the reasons set forth above, individually and collectively, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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